U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 March 2006

BALCA Case No.: 2005-INA-00008
ETA Case No.: P2003-NY-02493298

In the Matter of:

CENTRO INDEPENDENCE DE TRABAJADORES AGRICOLAS,
Employer,

on behalf of

JENNIFER ADLER,
Alien.

Appearance: Carolyn Martini, Esquire
Newburgh, New York
For the Employer

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Centro Independiente de Trabajadores Agricolas (Employer) filed an application for labor certification[2] on behalf of Jennifer Adler (Alien) on January 4, 2002 (AF 7,

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the

85, 104).[3] Employer seeks to employ the Alien as a Program Manager (Occ. Code: 189-167-030). *Id.* This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

Employer's description of the position duties was amended several times in the course of these proceedings. Employer's final description of the job duties for this position was as follows:

> Manages organization to insure that implementation and prescribed activities are carried out in accordance with specified objectives. Plans and develops methods and procedures for implementing program. Directs and Coordinates program, activities and exercises control over personnel responsible for specific functions or phases of program. Confers with staff to explain program and individual responsibilities for functions and phases of program. Directs and coordinates personally or through subordinate managerial personnel, activities concerned with implementation and carrying out objectives of program. Writes reports and records activities to ensure progress is being accomplished toward organization program objectives and modifies or changes methodology as required to redirect activities and attain objectives. Prepares program reports for superiors. Controls expenditures with budget allocations. Specific day to day duties include: payroll, correspondence, translations, and liaison to migrant workers.

(AF 7) In the final version of the amended application, Employer required one year of college and no experience. Employer also required fluency in Spanish (AF 7).

Initially, Employer requested reduction in recruitment (RIR) processing (AF 12). In the first Notice of Findings (NOF-1), issued October 8, 2003, the CO stated that the "Employer's request for Reduction in Recruitment (RIR) is hereby denied." The CO also found deficiencies with the training and experience required on the original application (AF 79-82). Employer agreed to amend the application and repost the job opportunity with the amended requirements.

Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] In this decision, AF is an abbreviation for Appeal File.

Employer also agreed to re-advertise the position (AF 77-78). The CO then issued a second Notice of Findings (NOF-2) on July 28, 2003, raising additional deficiencies with Employer's requirements for the job opportunity (AF 74-76). By letter dated August 14, 2003, Employer again agreed to amend the application and repost the position (AF 71-73).

On October 6, 2003, the case was remanded to the local job service for regular processing (AF 70). Following supervised advertising under regular processing, Employer submitted a report on recruitment efforts on December 15, 2003 (AF 30). The case was transmitted to the CO on January 9, 2004 (AF 27). On January 16, 2004, the CO issued a third Notice of Findings (NOF-3). The CO noted that the regulations at 20 C.F.R. § 656.24(b)(2)(ii) state in part that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. Section 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

The CO then noted there were seven U.S. applicants for the job opportunity which required one year of college, no experience, and fluency in Spanish. The CO accepted Employer's rejection of two of the U.S. applicants. The CO noted, however, that Employer's rejection of U.S. Applicants Ortiz, Yanes, Costagliola, Scialpi, and Patorino was because: (1) they lacked experience with migrant farm workers or with non-profit organization; (2) had no payroll or budget experience; and, (3) were unable to travel around New York State as needed. The CO stated that the job offer did not require experience, and traveling was not listed in the job duties under item 13 on Form 750A. The CO then stated that an employer cannot add or change job requirements during or after advertising in an effort to disqualify U.S. workers. In addition, the CO noted that Employer did not submit any evidence (telephone logs) of contact with the applicants. The CO concluded that Employer had not adequately established that the five applicants listed above were rejected solely for lawful job-related reasons (24-26).

Employer submitted rebuttal on January 20, 2004 (AF 18-23). Employer submitted telephone logs to demonstrate contact with U.S. Applicants Patorino, Scialpi, and Costagliola. However, calls to U.S. Applicants Ortiz and Yanes were local calls and the phone logs for these calls were not available without a subpoena. In addition, Employer stated that U.S. Applicants Ortiz, Yanes, Costagliola and Scialpi did not have the Spanish language expertise that the Alien possesses. Employer also stated that the Alien had already worked for two years and time had been spent training her for the job. Employer also noted that U.S. Applicant Patorino was unwilling to be interviewed in Spanish, despite the fact that his resumed stated that he was proficient in Spanish.

On March 1, 2004, the CO issued a Final Determination denying Employer's application for labor certification (AF 15-17). The CO again noted that the regulations at 20 C.F.R. §§ 656.25(b)(2)(ii), 656.21(b)(6) and 656.20(c)(8) require that an employer must reject a U.S. applicant solely for lawful job-related reasons. The CO accepted Employer's rebuttal evidence regarding U.S. Applicant Patorino. The CO found, however, that since U.S. Applicants Ortiz, Yanes, Costagliola and Scialpi exceeded Employer's minimum requirements, Employer's rejection of those applicants based on their lack of Spanish fluency was not for lawful job-related reasons. In addition, the CO noted that the fact that the Alien received two years of training confirms that the job is that of a trainee position, and Employer must be willing to train prospective employees such as the four qualified U.S. applicants. Since the evidence did not rebut all the deficiencies set forth in the NOF-3, the application was denied.

On April 2, 2004, Employer requested review (AF 3, 13). The case was docketed by the Board of Alien Labor Certification Appeals (Board) on November 4, 2004.

DISCUSSION

The CO denied this application because she found that four of the U.S. applicants were qualified for the job opportunity, and Employer did not establish a lawful job-related reason for rejecting those U.S. applicants. In general, an applicant is considered qualified for a job if he or

she meets the minimum requirements specified for that job in the labor certification application. *Veteran's Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988) (en banc). The CO found that the four named U.S. applicants met Employer's requirement of one year of college, no experience, and expertise in Spanish. A review of the resumes for the four U.S. applicants supports the CO's finding since all four U.S. applicants had at least one year of college and were bi-lingual in Spanish (AF 35-44). In particular, one U.S. applicant was of Ecuadorian origin and, thus, clearly had expertise in Spanish (AF 40), and another U.S. applicant submitted her resume in both English and Spanish, also demonstrating expertise in Spanish (AF 38-39).

Employer's rebuttal statement that these applicants were rejected because they did not have the same Spanish language expertise that the alien possesses does not provide a lawful job-related reason for rejecting the four U.S. applicants who met the minimum requirements for the job. Employer's earlier statements that these U.S. applicants did not have experience in migrant farm workers, with non-profit organizations, with payroll and budgets experience, or because they were unable to travel around New York State as needed, were clearly unlawful since these requirements were not part of the minimum requirements set forth on form 750A. All four named U.S. applicants clearly met Employer's minimum requirements as set forth in the application for labor certification. It is well-settled that certification is properly denied where an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 1990-INA-26 (Jan. 24, 1991).

Furthermore, Employer's rejection of the four qualified U.S. applicants because they were not as qualified as the alien was clearly not for lawful job-related reasons. It is also well-settled that an employer may not reject applicants because the alien is more qualified. *K Super KQ 1540-A.M.*, 1988-INA-397 (Apr. 3, 1989) (*en banc*); *Papalera del Plata*, 1990-INA-53 (Dec. 20, 1990), *aff'd* (Jan. 31, 1992) (*en banc*).

Based on the foregoing, Employer has not demonstrated lawful job-related reasons for rejecting the U.S. applicants as required by Sections 656.24(b)(2)(ii), 656.21(b)(6) and 656.20(c)(8). Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.